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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1930.

No. 179. October Term, 1930.

FARBWERKE VORMALS MEISTER LUCIUS & BRUNING, DEUTSCHE GOLD & SILBER SCHEIDE ANSTALT VORM. ROESSLER, and BADISCHE-ANILIN & SODA-FABRIK,
Petitioners,

against

CHEMICAL FOUNDATION, INC.; E. I. DUPONT DENEMOURS & CO., and WALTER O. WOODS, as Treasurer of the United States,
Respondents.

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Respondents.

MEMORANDUM ON BEHALF OF RESPONDENT THE CHEMICAL FOUNDATION, INC., IN REPLY TO THE BRIEF OF MR. VANDIVER.

(Filed by permission of the Court.)

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Statement.

While a large part of Mr. Vandiver's brief appears to consist of argument intended to show that the Chemical Foundation, in its suit, was entitled to no relief whatever (as for example at pp. 55-56 of his brief), it was our understanding upon the argument that he conceded, as he had on all other occasions, that the decree in favor of the foundation was correct except for such of its provisions as adjudged:—

(1) That the Foundation had acquired, though it did not seek to enforce, the right to recover from the Dupont Co. for use and enjoyment of the patents before the date on which the patents were conveyed to the Foundation, and

(2) That accordingly the Foundation was entitled to the benefit, as security for the ultimate recovery, of all moneys deposited in the treasury by the licensee, whether deposited in respect of use and enjoyment before or after the said conveyance.

Accordingly, we shall deal herein only with those parts of the brief which attack the correctness of these two features of the decree.

Since all parties now admit that the conveyance of the patents carried to the Foundation the right to recover, under Section 10(f) of the Trading with the Enemy Act, for all use and enjoyment thereafter, the sole remaining question is whether the seizures and sales carried also the right to recover for the earlier period. In discussing this question it should be noted at the outset that the fact that the Foundation did not claim, in its bill of complaint, the rights for the period

prior to seizure, was not due to doubt of its title to them, but was the result of a definite policy, adopted and announced as long ago as the trial in *U. S.* v. *Chemical Foundation* (272 U. S. 1). The Foundation did not desire that the American chemical industry, which it was established to foster, should be burdened by obligations incurred before it began to function, and therefore made a deliberate waiver.

We have in our main brief fully presented our reasons for our belief that seizure of the patents themselves necessarily took from those who owned the patents at the time of seizure, all right to sue under Section 10(f) for any use and enjoyment whenever had, whether such rights were separately seized, or not. To those reasons we desire to add but one observation, in answer to an argument which has not been made, but which may suggest itself to the Court. The provision of Section 10(f) to the effect that if

> "after payment of all such *judgments* and *decrees*, there shall remain any balance of said deposit, such balance shall be repaid to the *licensee*" &c. (Italics ours.)

does not indicate, as might be suggested, that the Act contemplated suits by successive owners of the patents to recover for use and enjoyment during the ownership of each. It merely contemplates exactly what has happened in the case at bar, where under one license the licensee was authorized to operate under patents belonging to several different owners. Under such a license but one tentative royalty would be paid in, but the owner of each licensed patent would sue. Accordingly, under any license, several decrees might be rendered in favor of plaintiffs each of whom owned a patent at the time of suit, and each of these would be entitled to look to the deposited fund as security for his decree. The use of the plural "*decrees*" and "*judgments*" therefore, does not imply that Congress meant to authorize one who, at the time of suit, had ceased to be the owner of a patent, to bring a suit in which the whole future of that patent would be settled.

Turning now to the arguments adduced to show that the rights for the period prior to the seizure of the patents, were not separately seized:

(1)

Mr. Vandiver argues that the seizures did not include the accrued rights because the Alien Property Custodian had no power to seize them.

This contention he bases on the theory that even the comprehensive language of Section 7(c) of the Act, which empowered the Custodian to seize

> "any money or other property including (but not "thereby limiting the generality of the above) patents "* * * choses in action, and rights and claims of every "description",

was not broad enough to include the peculiar privilege conferred upon the "owner of any patent" by Section 10(f). This contention, made in the face of his absolute concession at page 16 of the Petition and Brief on behalf of the former enemy owners on which the Certiorari was granted, to the effect that the Custodian "undoubtedly had authority to seize the royalties as well as the patents," he seeks to support by several propositions.

First, he argues at length that the right to sue conferred by Section 10(f) was neither "property" nor a "chose in action" nor a "right" nor a "claim", because it could be enforced only after the end of the war, before which date Congress could have revoked it. To state this proposition seems to us to refute it. No enemy legal right could be enforced till after the war. If that defect was sufficient to deprive an otherwise perfect German title, lien, or other claim of its normal status as "property" or as a "chose in action", no German rights whatever could ever have been seized. The fact, if it be a fact, that Congress could revoke the grant is equally immaterial. The grant was absolute while it lasted, and it has endured: but even if this had been

a real contingency, the contingent right was still "property", still a "chose in action", and still a "claim". Mr. Vandiver's brief itself continually refers to it as a "right". The elements of futurity and contingency in it are far less important than, for example, in the inchoate right of dower, yet no one has ever doubted that the latter was property.

He also argued that the funds deposited in the treasury by the licensee were money and not enemy money, and that the Custodian accordingly had no power to seize them. But no attempt was ever made to seize or sell these funds themselves. They were deposited as a trust fund to secure the decree in the suit to be brought, or to be returned to the licensee. All that was seized and sold, so far as concerned these moneys, was the owner's right under that trust.

He further argued that rights against these funds are claims against the United States, and cannot therefore be assigned without statutory authority. But the statutory authority to transfer them by seizure is clear, since as has been shown, they are unmistakably within the class of enemy property which the Custodian is expressly authorized to seize. These arguments are but a few of many instances in which the brief confuses the right of action in question with the actual moneys paid in by way of security royalty. No argument as to what could or could not be done with the latter has any tendency to show what could or could not be done with the former.

(2)

Mr. Vandiver also argues that the statutes, particularly the 1928 Amendment, show an intent on the part of Congress that the right to sue under Section 10(f) should not be seizable. As to the original Act and the earlier amendments we cannot follow his reasoning. The 1928 Amendment, however, seems to us to recognize conclusively that the very rights here under discussion are seizable. It, in terms, applies to suits previously brought by the Custodian under patents seized by him, to recover for use and enjoyment had

before such seizure, and provides that in such suits the Custodian shall be deemed the "owner" entitled to sue. This is a clear recognition that after seizure and before sale the Custodian was vested either by mere ownership of the patent or by the independent effect of the seizure itself, with the rights theretofore accrued. Obviously this could not be so unless, either independently, or as an appurtenance to the patents, such rights were seizable.

(3)

Mr. Vandiver argues that the Germans never ceased to be the "owners" of the patents, because the Federal Trade licenses had cut out of them so much of their substance that thereafter the conveyances gave the Foundation, under the rule in *Waterman* v. *Mackenzie*, 138 U. S. 252, the status of a licensee only. That case, however, itself disposes of this contention. There, a license having been granted to make and sell, only, the licensee attempted to sue for infringement, and the court held that since the right to use was not included in the license, there was no assignment to the licensee, who was therefore not the person authorized by the Patent Law to sue in his own name. They also held, however, that the licensor should have been joined as plaintiff since he was the owner entitled to sue. As he had parted with far more than, in the case at bar, had been taken from these patents by the issue of the non-exclusive Federal Trade licenses, it is clear that the existence of such a license does not so diminish ownership as to deprive the licensor, or his assignee, of his status as "owner". For another reason moreover, no reasoning based on *Waterman* v. *Mackenzie* can govern the case at bar. The question there at issue was the construction of a totally different statute, differently worded, dealing with a radically different situation and subject matter, and in no sense *in pari materia*. Finally, if Mr. Vandiver's contention in this behalf were sound, the sale of a patent subject to an outstanding license, would in every

case, leave the buyer unable to sue in his own name for infringement.

In this connection Mr. Vandiver incorrectly states that the President continued the power of the Federal Trade Commission to license under patents which had been seized. This is offered as further proof that the Custodian got and sold to the Foundation something less than ownership. It is a clear error, however. The President could do nothing of the kind. Section 10 of the Act gave power to license only under enemy-owned patents, and a seized patent was no longer enemy-owned. The power to license under seized patents was nevertheless (quite needlessly) withdrawn in the Executive Order of Dec. 3, 1918 (R. 121). It was not, as stated at page 43 of the brief, restored by the Order of November 25th (R. 124), which affects only an order of May 11th (R. 111) having nothing to do with the power to license under patents. The Foundation did not, therefore, buy the patents subject to a continuing power, in another, to issue licenses under them.

(4)

In construing the instruments of seizure in question, we submit that the Court should give great weight to executive construction, which has in this instance been unusually specific and uniform. In at least four instances extending over more than ten years, different branches of the Executive have practically construed the seizures as including the rights in question. President Wilson in his Executive Order of February 13th, 1920 (R. 89) stated that the original intent of the earlier orders, under which the whole transaction was carried through, was that thereunder the Custodian should sell property "including rights to receive moneys by way of royalties or otherwise as compensation for the use of patents". Since such rights could not be sold unless seized, this is both first-hand evidence as to the actual intent of the seizure—the most important factor, as the Circuit

Court of Appeals held, in construing an instrument of confiscation—and an ordinary executive construction of the instruments of seizure as actually executed. The Confirmatory Assignment of the Alien Property Custodian, issued under the foregoing order on March 1st, 1921 (R. 95), asserts the same original intention, and by specifically conveying anew, to the Foundation, the rights in question, construes the seizures as having vested title in those rights in him. These instruments, of course, refer to all rights to sue for use and enjoyment of the patents, whenever had; but they must be taken as including at least the rights for the earlier period, since for the later period no special seizure or conveyance would be necessary, as the transfer of the patents themselves would admittedly carry with it all rights subsequently to accrue.

This construction has since been several times reiterated, notably by the Department of Justice, when, on the trial and during the appeals in *U. S.* v. *Chemical Foundation* (172 U. S. 1), it attacked the sales on the very ground that they included the rights in question; and by the Alien Property Custodian, when, in these very suits, he contended below that the seizures took every right, of this character, which the Germans ever had.

(5)

The acts of the President in authorizing the Alien Property Custodian to sell the rights in question, and of the Custodian in selling them as so authorized, are orders of a department of the government made or purporting to be made in pursuance of war legislation with regard to enemy property. We therefore feel bound to call to the attention of the court the provisions of Annex 1 of the Treaty of Versailles, operative under the Treaty of Berlin, which appear to confirm such orders and to prevent the raising of any question in regard thereto. The applicable provisions are as follows:

ANNEX.

1.

"In accordance with the provisions of Article 297, paragraph (d), *the validity* of vesting orders and of orders for the winding up of businesses or companies, and *of any other orders*, directions, decisions or instructions *of* any court or *any department of the Government* of any of the High Contracting Parties *made* or given, *or purporting to be made* or given, *in pursuance of war legislation with regard to enemy property*, rights and interests *is confirmed. The interests of all persons shall be regarded as having been effectively dealt with by any order, direction, decision or instruction dealing with property in which they may be interested, whether or not such interests are specifically mentioned in the order, direction, decision, or instruction. No question shall be raised as to the regularity of a transfer of any property, rights or interests dealt with in pursuance of any such order, direction, decision or instruction*" (italics ours).

(Part X, Section IV Article 297(d) and Annex paragraph I Treaty of Versailles, adopted by Article II(1), Treaty of Berlin, 42 Stat. 1939, 1943.)

Respectfully submitted,

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